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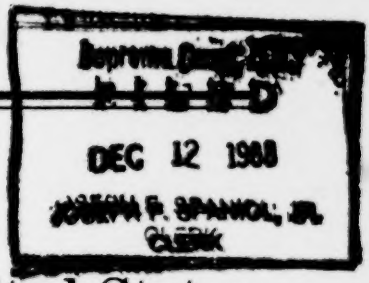

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RALPH RODNEY FIELDS,

Petitioner,

v.

JOSEPH T. DURHAM, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether Parratt v. Taylor, 451 U.S. 527 (1981), and its progeny bar a claim under 42 U.S.C. § 1983 resulting from a deprivation of rights by the highest officials of a state institution when a predeprivation hearing is practicable.

PARTIES TO THE PROCEEDING

Ralph Rodney Fields was Plaintiff in the trial court and is Petitioner herein. Joseph T. Durham, James S. Jeffers, and the Board of Trustees of Community College of Baltimore were Defendants in the trial court and are respondents herein.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED.	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	10
CONCLUSION	32
APPENDIX A	1a
APPENDIX B	21a

TABLE OF AUTHORITIES

Cases

Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985).....	25,26
Fetner v. City of Roanoke, 813 F.2d 183 (11th Cir. 1987).....	27,28,29
Holloway v. Walker, 790 F.2d 1170 (5th Cir. 1986), cert. denied 479 U.S. 984 (1986).....	17

Hudson v. Palmer, 468 U.S. 517 (1984) 10,12,13, 19

Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986)..... 24,25

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)..... 14,15,16

Parratt v. Taylor, 451 U.S. 527 (1981)..... i,10,11, 13,15,18, 19,21,23 26,28,30 31

Patterson v. Coughlin, 761 F.2d 886 (2nd Cir. 1985), cert. denied 474 U.S. 905 (1986)..... 18,19

Piatt v. MacDougall, 773 F.2d 1023 (9th Cir. 1985)..... 26,27

Salisbury v. Housing Authority of City of Newport, 615 F. Supp. 1433 (E.D. Ky. 1985)..... 29,30

Schultz v. Baumgart, 738 F.2d 231 (7th Cir. 1984)..... 23,24

Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985), rev'd on other gds., 474 U.S. 918 (1986)..... 22,23

Stana v. School District of the City of Pittsburgh, 775 F.2d 122 (3rd Cir.

1985)..... 20,21,22

Westborough Mall, Inc. v. City of Cape Girardeau, 794 F.2d 330 (8th Cir. 1986), cert. denied 107 S.Ct. 1373 (1987) 25

Statute

42 U.S.C. § 1983..... i,2,3,8, 9,11,12, 13,14,16, 17,18,20, 21,22,25, 27,28,30, 31,32

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (App., infra, 1a) is reported at 856 F.2d 655 (4th Cir. 1988). The opinion of the District Court is set forth in the Appendix, infra at p. 21a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

This case originated upon the filing of a complaint in the United States District Court for the District of Maryland by Petitioner, Ralph Rodney Fields. After the filing of an Amended

Complaint, the suit proceeded against Respondents, Joseph T. Durham (hereinafter "Durham"), president of the Community College of Baltimore (hereinafter the "College"), James J. Jeffers, Chairman of the Board of Trustees of the College, and the Board of Trustees. The Amended Complaint included a claim under 42 U.S.C. §1983 and pendent state claims. Jurisdiction was based upon 28 U.S.C. §§ 1331 and 1343.

Petitioner, in 1970, was elected to tenure as a member of the faculty of the College. The Bylaws of the College required that tenured teachers could be dismissed only with one year notice and that a trial at which all requirements of due process were to be followed was required for dismissal, if requested. In 1974, Petitioner was promoted to the faculty rank of professor and, in 1978,

was promoted to the administrative position of Dean of Faculty/Provost. In 1979, in order to comply with a union collective bargaining agreement, the College issued a document entitled "Conditions of Appointment for Administrators and Non-Instructional Personnel" (hereinafter "Conditicns"), which provided that an administrative title was not to be held concurrently with professional rank.

In 1984, Petitioner was reappointed as Dean of Faculty/Provost for a three year term and, pursuant to the Conditions, could only be terminated for certain grounds. During Petitioner's employment as Dean of Faculty/Provost, prior to 1986, he received outstanding evaluations.

In 1985, Respondent Durham was appointed as interim President of the

College and at that time, because of numerous vacancies, Petitioner was required to assume many additional duties and responsibilities. Petitioner alleged in his Amended Complaint that, following his permanent appointment as President, Respondent Durham began to plan to replace Petitioner with an appointee of his choosing.

Respondent Durham distributed a memorandum on February 12, 1986 in which he demanded that evaluation of administrators be completed by May 15, 1986 and that reviews of the evaluations be completed by May 22, 1986. The memorandum further indicated that Respondent Durham would evaluate Petitioner, but that there could be no review of the evaluation. On March 10, 1986, Respondent Durham sent Petitioner a memorandum stating that he might give

Petitioner a negative evaluation and listing several reasons therefor. Thereafter, on June 27, 1986, following an unrelated meeting, Respondent Durham gave Petitioner a letter terminating him for an allegedly unsatisfactory evaluation. Petitioner was also given a completed evaluation form. Petitioner then submitted a lengthy response to the evaluation in accordance with the evaluation procedure. Pursuant to the Conditions, Petitioner appealed his termination to the Cabinet. A hearing was scheduled for July 23, 1986. Following discussions concerning the procedure of the hearing, Petitioner determined that such a hearing would be meaningless and, therefore, appealed to the Respondent Board of Trustees. That appeal was heard on August 12, 1986 and, as alleged by Petitioner, that hearing

was procedurally defective. Respondent Durham submitted no documentary evidence against Petitioner other than his own evaluation. Further, no witnesses were called by Respondent Durham other than himself, to testify against Petitioner. Additionally, the Respondent Board failed to review the vast documentary evidence offered by Petitioner. On August 15, 1986, the Respondent Board affirmed the termination "for cause." Despite Petitioner's qualifications, he was barred by Respondent Durham from teaching any courses at the College. Petitioner alleged that the actions taken by the Respondents were in violation of the Bylaws, the Conditions, and due process and were an illegal and impermissible vehicle designed to permit Respondent Durham to "squeeze out" Petitioner without affording him due process.

Petitioner's Amended Complaint contained the above allegations and set forth five causes of action. Count I alleged a violation of 42 U.S.C. §1983, claiming that Petitioner's procedural due process rights were violated by the Respondents' failure to, inter alia:

a) provide adequate notice and specification of charges;

b) provide a hearing before an impartial decision maker;

c) adhere to its own policies and procedures.

Petitioner further alleged that the Respondents violated his substantive due process rights and illegally deprived him of his liberty interest. The Amended Complaint also contained pendent state claims for breach of contract, civil conspiracy, tortious interference with contractual relationship and wrongful

discharge.

Following the completion of discovery, Petitioner filed a Motion for Partial Summary Judgment and Respondents filed Motions to Dismiss and/or for Summary Judgment. Extensive memoranda in support of and in opposition to those Motions were filed. Thereafter, on January 12, 1988, the District Court issued an Order raising, sua sponte, the issue of "the availability of an adequate post-deprivation remedy under state law (by way of a contract or tort action) for defendants' alleged failure to give plaintiff a fair hearing." As directed, the parties filed Memoranda addressing that issue on January 22, 1988. On January 29, 1988, the District Court granted Respondents' Motion without a hearing and dismissed Petitioner's §1983 claim and also dismissed, without

prejudice, the pendent state claims.

The United States Court of Appeals for the Fourth Circuit affirmed, holding that Petitioner did not have a cause of action under 42 U.S.C. § 1983 since due process was satisfied by the availability of adequate state law remedies. The Fourth Circuit first found that Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517 (1984) were not necessarily inapplicable even if a predeprivation hearing was practicable. The Fourth Circuit further held that the actions taken were random and unauthorized despite the fact that they were taken by high ranking state employees.

REASONS FOR GRANTING THE PETITION

The decision of the Fourth Circuit seriously undermines effectuation of the purposes and policies of 42 U.S.C. §1983.

The decision also leads to inconsistent interpretation of 42 U.S.C. §1983 nationwide because it directly conflicts with decisions in other circuits. Accordingly, this Court should grant certiorari to reaffirm the interpretation that a claim under 42 U.S.C. § 1983 is cognizable when a deprivation results from the actions of high state officials and a predeprivation hearing is possible.

In Parratt v. Taylor, 457 U.S. 527 (1981), a prisoner had ordered by mail certain hobby materials valued at $23.50. After delivery of packages of the materials to the prison, the packages were lost after the usual procedure for receipt of mail packages was not followed. The prisoner filed suit under 42 U.S.C. § 1983 claiming a violation of his due process rights. This Court held that no violation of § 1983 had occurred

because:

> The deprivation did not occur as a result of some established State procedure. Indeed, the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established State procedure. There is no contention that the procedures themselves are inadequate nor is there any contention that it was practicable for the State to provide a predeprivation hearing. Id. at 543.

Because this was a random and isolated incident, the State could not have provided a predeprivation hearing. Further, the State provided a tort claims procedure whereby the prisoner could have filed suit for his damages resulting from the loss of his packages. This Court held that 42 U.S.C. § 1983 does not turn every injury inflicted by a State official into a violation of the Fourteenth Amendment.

Similarly, in Hudson v. Palmer, 468 U.S. 517 (1984), a prisoner filed a 42

U.S.C. § 1983 action alleging that a correctional officer had conducted a "shakedown" search and had destroyed certain of the prisoner's personal property. After holding that a prisoner has no reasonable expectation of privacy in his prison cell, this Court held that Parratt's rationale equally applied to intentional deprivations of property. This Court observed that no distinction exists between negligent and intentional deprivations "insofar as the practicability of affording predeprivation process is concerned." Id. at 533. This Court stated:

> [In Parratt] we held that post deprivation procedures satisfy due process because the State cannot possibly know in advance of a negligent deprivation of property. Whether an individual employee himself is able to foresee a deprivation is simply of no consequence. The controlling inquiry is solely whether the State is in a position to provide for predeprivation process. Id. at 534.

(Emphasis supplied by the Court). Consequently, because that act was random and unauthorized and a predeprivation hearing was impracticable, and because a tort remedy existed whereby the prisoner could have obtained compensation for the destruction of his property, no 42 U.S.C. § 1983 violation had occurred.

This Court also addressed this issue in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). In Logan, an employee who was discharged because of a physical handicap filed a discrimination charge with the Illinois Fair Employment Practices Commission. Inadvertently, the hearing before the Commission was scheduled after the expiration of the statutory period for holding such a hearing. Consequently, the Illinois Supreme Court determined that the Commission lacked jurisdiction to

consider the charge. This Court held that the plaintiff was, in fact, entitled to have his charge heard by the Commission and concluded that his due process rights were violated. This Court rejected the contention that, under Parratt, the State's post-deprivation tort action would constitute sufficient due process. Rather, this Court held:

> here, in contrast [to Parratt], it is the State system itself that destroys a complainant's property interest, by operation of law, whenever the Commission fails to convene a timely conference -- whether the Commission's action is taken through negligence, maliciousness, or otherwise. Parratt was not designed to reach such a situation. [Citation omitted]. Unlike the complainant in Parratt, Logan is challenging not the Commission's error, but the 'established State procedure' that destroys his entitlement without according him proper procedural safeguards. Id. at 436.

This Court further held that:

> . . . absent "the necessity of quick action by the State or the impracticability of providing any

> predeprivation process" a post-deprivation hearing here would be constitutionally inadequate . . . That is particularly true where, as here, the State's only post-termination process comes in the form of an independent tort action. Seeking redress through a tort suit is apt to be a lengthy and speculative process, which in a situation such as this one will never make the complainant entirely whole. . . . Id. at 436-437.

Consequently, the abrogation of the plaintiff's right to a predeprivation hearing was a violation of due process despite the existence of the post-deprivation remedy.

In the case at bar, the Fourth Circuit rejected Petitioner's claim that his cause of action under 42 U.S.C. 1983 was cognizable because the inadequate predeprivation proceedings were, in the court's view, random acts which were unauthorized by the State.[1] The Fourth

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[1]The Fourth Circuit failed to address Petitioner's allegation that the (footnote continued)

Circuit cited the decision of the United States Court of Appeals for the Fifth Circuit in Holloway v. Walker, 790 F.2d 1170 (5th Cir. 1986), cert. denied 479 U.S. 984 (1986), in support of its decision. However, the majority of the circuits considering this issue, the Second, Third, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, have held that deprivations by state officials with high levels of authority are not random and unauthorized and that a predeprivation remedy which is not followed by the State's agent supports a cause of action under 42 U.S. § 1983. Further, these

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(footnote continued from previous page) deprivation was, in fact, based upon state policy and procedure in that it was the result of the College's procedures which improperly differentiated between administrative tenure and faculty tenure and which failed to provide for a meaningful hearing before an impartial decision maker.

circuits hold that the practicability of predeprivation process renders Parratt inapplicable.

The Fourth Circuit's misapplication of Parratt to the instant case is demonstrated by the holding of the Court of Appeals for the Second Circuit in a case involving a similar factual situation. In Patterson v. Coughlin, 761 F. 2d 886 (2nd Cir. 1985), cert. denied 474 U.S. 905 (1986), the Court of Appeals for the Second Circuit reversed the dismissal of a prisoner's § 1983 claim. The prisoner contended that he was placed in isolation after a defective prior hearing. The trial court dismissed, citing Parratt and holding that an adequate post-deprivation remedy was provided. In reversing, the Court rejected the trial court's holding that: "'[b]ecause the [hearing] procedures

existed, but were allegedly not followed, no meaningful predeprivation hearing was possible.'" Id. at 891. The Court held that Parratt and Hudson were inapplicable, stating:

> What does matter, however, is whether that conduct of the state's agent that resulted in the deprivation was such as to make the injury unforeseeable when reviewed from the position of one who possesses the state-delegated authority to grant a hearing when circumstances and the Constitution so require. It is at least a question of fact whether the decision to place appellant in the SHU was made by "officials with final authority" over the decision. [Citation omitted]. Unlike the deprivation of property that occurred in Parratt, here the responsible state officials who had the power to grant appellant a hearing obviously knew that appellant was in peril of being deprived of his liberty interest. In fact, he was given a hearing, albeit a deficient one. Thus, the deprivation of liberty was neither "random" nor "unauthorized." Id. at 892. (Emphasis added).

As in Patterson, petitioner was given a predeprivation hearing which was

defective and which was in violation of his due process rights. Respondents, in choosing to violate the pretermination procedures, had final state authority over the decision. That violation is not excused because of a possible post-deprivation remedy which petitioner might arguably have.

In Stana v. School District of the City of Pittsburgh, 775 F. 2d. 122 (3rd Cir. 1985), the Court of Appeals for the Third Circuit reversed the grant of summary judgment against a teacher claiming a 42 U.S.C. § 1983 violation. The plaintiff had applied for a teaching position which was required to be filled by an individual on an eligibility list. Although the plaintiff was on the list, she was bypassed for the position because of negative evaluations regarding her which were received by the Assistant

Director of Personnel. The position was given to an individual who was not on the list. The plaintiff filed a 42 U.S.C. § 1983 action based upon the school district's failure to provide her with a notice and hearing concerning the negative evaluation. The trial court granted the defendant's motion for summary judgment as it considered the Assistant Director's appointment of a non-eligible individual to be "'a random unauthorized act by a state employee.'" Id. at 125. Therefore, since the plaintiff had access to the state courts for redress, the trial court held that Parratt mandated dismissal.

The Court of Appeals reversed, holding that "a pretermination hearing was neither impracticable nor impossible." Id. at 129. The Court further stated:

> . . . when the acts at issue were those of an official in a supervisory position, acting within the area of his authority, the governmental entity was in a position to provide some predeprivation process. Id. at 130.

The Court therefore concluded that:

> . . . if the governmental entity could have, but did not, provide predeprivation procedure, a § 1983 action complaining of the lack of procedural due process may be maintained in federal court, notwithstanding the availability of state judicial routes as well. Id.

Similarly, in Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985), rev'd on other gds. 474 U.S. 918 (1986), a teacher filed a § 1983 suit alleging, inter alia, that he was not afforded procedural due process in connection with a suspension and reprimand imposed on him. The Sixth Circuit Court of Appeals held that:

> The holding in Parratt that the provision of post-deprivation remedies by state courts will, in some cases, suffice to provide all of the process due in property

> deprivation claims applies only where, as in Parratt, 451 U.S. at 540-542, 101 S.Ct. at 1915-1916, a predeprivation hearing was "impracticable" or "impossible." Here a pretermination due process hearing was both practical and feasible. Loudermill v. Cleveland Board of Education, 721 F.2d 550, 562 (6th Cir. 1983), aff'd, _____ U.S. _____, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985). Id. at 215.

The Seventh Circuit has also reached the same conclusion. In Schultz v. Baumgart, 738 F.2d 231 (7th Cir. 1984), a firefighter was summarily discharged without notice or a hearing, despite a statute requiring notice and a hearing. The lower court granted summary judgment against the plaintiff on his § 1983 claim. The Court of Appeals reversed, and held that Parratt does not govern when a meaningful predeprivation hearing was possible. The Court observed:

> The deprivation alleged here is, by contrast, a garden variety summary dismissal, and the city could easily have complied with requirements for predeprivation procedures. In these

> circumstances, this court has consistently held that some form of predeprivation process is required, and Parratt v. Taylor is therefore inapplicable. Id. at 238.

In Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986), the Court of Appeals for the Eighth Circuit, in analyzing whether due process rights had been violated in connection with a building permit application, first observed that: "Parratt therefore applies only if a determination has been made that a predeprivation hearing is not required." Id. at 600. The Court continued, stating:

> . . . in analyzing a claim that the deprivation of property violated procedural due process, a court must first consider if the Plaintiff has a constitutionally protected property interest. If there is a protected property interest, the Court then considers whether the plaintiff has a right to a predeprivation hearing for the violation . . . If the Plaintiff has a right to a predeprivation hearing, then the inquiry proceeds to what type of predeprivation hearing is

> required. If a predeprivation hearing is not required, the inquiry is whether state post-deprivation hearings are adequate. State post-deprivation remedies cannot satisfy due process if a predeprivation hearing is required.
>
> . . . Erroneously, the parties and the court considered the availability and adequacy of state post-deprivation remedies without first determining if a predeprivation hearing was required. Id. (Emphasis added).

(See also, Westborough Mall, Inc. v. City of Cape Girardeau, 794 F.2d 330, 337 (8th Cir. 1986), cert. denied 107 S.Ct. 1373 (1987): "the availability of post-deprivation remedies is not a defense to the denial of procedural due process where predeprivation process is practicable.")

In Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985), the plaintiff alleged a violation of § 1983 as a result of an alleged conspiracy among police, prosecutors and others to falsely

prosecute him. The Ninth Circuit Court of Appeals, sitting en banc, reversed the dismissal of the Complaint. The Court, in distinguishing Parratt, held:

> Parratt is directed at minor infractions of prisoners' interests [citation omitted] when the alleged conduct is random and unauthorized, both in its inception and in its execution. By definition, a conspiracy, if one existed here, cannot be a random act, even if it was accomplished without the endorsement of the state governmental apparatus. A conspiracy to prosecute maliciously may, indeed, be unauthorized, but so is much of the state action which has historically led to liability under § 1983.
>
> As in Logan, Bretz is challenging the direct abuse of state process itself. It is meaningless to speak of the State's ability to provide post-deprivation remedial process where the state process itself has been abused. Id. at 1031.

Similarly, the Ninth Circuit Court of Appeals sitting en banc held, in Piatt v. MacDougall, 773 F.2d 1032 (9th Cir. 1985):

> . . . Parratt is not applicable to a case in which the state official is acting pursuant to a state policy and deliberately carrying out what appears to that official to be proper procedures. [Citation omitted]. Parratt was designed only to reach situations in which the state administrative machinery did not and could not have learned of the deprivation until after it had occurred.
>
> Where the state has procedures, regulations or statutes designed to control the actions of state officials, and those officials charged with carrying out state policy act under the apparent authority of those directives, it makes no sense to say either that their conduct is "random" or that it is impossible for the state to provide a hearing in advance of the deprivation. The considerations underlying Parratt are simply inapplicable to deliberate, considered, planned or prescribed conduct by state officials, whether or not such conduct is unauthorized. Id. at 1036.

In Fetner v. City of Roanoke, 813 F.2d 183 (11th Cir. 1987), a police chief sued under § 1983 claiming that he was terminated without written notice or a hearing. The district court granted

summary judgment for the defendants, finding that Parratt provides that a procedural due process claim can be brought only if there is no procedure for relief in the state system. In reversing, the Court of Appeals for the Eleventh Circuit first noted that, if the lower court had meant that the plaintiff's § 1983 claim must first be brought in state court, or that an exhaustion requirement existed, then the court was incorrect. The Court of Appeals then reviewed whether the district court was correct in holding that the plaintiff suffered no constitutional deprivation because of the existence of post-deprivation state remedies. The Court distinguished Parratt, holding:

> . . . the injury to Fetner's property interest was caused by a conscious and deliberate act of the City's highest governing board. [Citation omitted]. The Roanoke City Council had ample time to give

> Fetner notice and offer him an opportunity to be heard before they fired him. The touchstone in Parratt was the impracticability of holding a hearing prior to the claimed deprivation. Id. at 539-41, 101 S.Ct. at 1914-16. In Fetner's case, meaningful predeprivation process was viable.
>
> Post deprivation remedies do not provide due process if predeprivation remedies are practicable. Logan v. Zimmerman Brush Co., 455 U.S. 422, 436, 102 S.Ct. 1148, 1158, 71 L.Ed. 2d 265 (1982). Where, as in this case, a deprivation of property is authorized by an established state procedure and it is practicable for the State to provide predeprivation procedures, due process has been consistently held to require predeprivation notice and a hearing in order to reduce the possibility of a wrongful deprivation. [Citation omitted]. Fetner thus states a valid procedural due process claim when he alleges that the defendant failed to give him written notice or a hearing before firing him. Id. at 1185-1186.[2]

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[2]Finally, in a case with remarkably similar facts as the instant case, the Eastern District of Kentucky, in Salisbury v. Housing Authority of City of Newport, 615 F.Supp. 1433 (E.D.Ky. 1985), denied the defendants' motion for summary judgment. The plaintiff had entered into

(footnote continued)

Thus, the decision of the Fourth Circuit creates a clear and direct conflict with decisions of the other

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(footnote continued from previous page) an employment contract which required ninety days notice prior to termination and permitted termination only for just cause. The employer suspended her, brought charges for termination, and convened a hearing, following which she was discharged. The plaintiff contended that her §1983 rights were violated because, although "the hearing contained all of the outward indicia of due process", id. at 1438, she was deprived of an impartial decision maker. The Court found that she was, in fact, denied such a right. The defendants, however, contended that the existence of state remedies provided the plaintiff with due process and that "plaintiff was not entitled to an unbiased tribunal in the pretermination hearing held here, because state judicial review provided an adequate post-termination hearing." Id. at 1442. The court rejected the defendants' contentions and, distinguishing Parratt, held:

> The [employer] did have opportunity to anticipate and control the proceedings. Therefore, this is not a case of a random, unauthorized act where "a predeprivation hearing is 'impracticable' or 'impossible.'" Id. at 1442, n.9.

courts of appeals. By applying Parratt in such a draconian manner, the court has drastically limited 42 U.S.C. § 1983 as a remedy for deprivation of due process by the highest state officials with authority over the process afforded the aggrieved party. Instead, the court has provided such officials with immunity from a constitutional remedy for such deprivations. Petitioner submits that such limitations were not intended by the drafters of 42 U.S.C. § 1983 nor by this Court in its holdings in Parratt and its progeny. The Petitioner therefore seeks review in this Court because of conflicting decisions of the appellate courts and because the Petitioner has been aggrieved by an incorrect ruling. Petitioner should not be deprived of his constitutional rights merely because of the state and circuit in which his suit

was filed.

CONCLUSION

For these reasons, to reaffirm the vitality of 42 U.S.C. § 1983 and to resolve the conflict among the Circuits, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-1564

(Argued July 12, 1988
Decided September 13, 1988)

RALPH RODNEY FIELDS

v.

JOSEPH T. DURHAM, et al.

WILKINSON, Circuit Judge:

On June 27, 1986, Ralph Fields was terminated from his position as Dean of Faculty and Provost at the Community College of Baltimore by the College's newly appointed president, Joseph Durham. The Board of Trustees approved Field's termination after a hearing held on

August 12, 1986. Fields subsequently filed suit against Durham, the College, its Trustees, and the Mayor and City Council of Baltimore under 42 U.S.C. § 1983. He alleged that he had been denied due process by defendants' failure to follow the procedures required by the bylaws of the College and the terms of his employment agreement in connection with his discharge.

Plaintiff has, at most, alleged a random and unauthorized failure of College officials to follow state procedures in connection with his termination. Due process is, therefore, satisfied by the meaningful postdeprivation remedies available under state law. Because plaintiff has failed to state a claim under § 1983, we affirm the district court's grant of summary judgment for defendants on that count.

We affirm also the dismissal of plaintiff's state claims without prejudice to his right to pursue those claims in state court.

I.

Ralph Fields began employment with the Community College of Baltimore in 1967 and received faculty tenure in 1970. Fields was promoted to the administrative position of Deed of Faculty/Provost in 1978. The following year, in order to comply with its collective bargaining agreement with the union, the College issued "Conditions of Appointment for Administrators and Non-Instructional Personnel," which precluded an individual from holding an administrative title concurrently with professorial rank and set forth procedures for termination of

administrative personnel. In 1984, Fields was reappointed to another three year term of Dean of Faculty/Provost.

In September 1985, in response to administrative and academic problems at the College, the Mayor of Baltimore appointed Joseph Durham interim president. Durham evaluated Fields and other top staff in June, 1986. Durham had earlier notified Fields of deficiencies in his performance. On June 27, 1986, Fields received an unsatisfactory evaluation and was informed that his employment was being terminated. Fields was told of his right to appeal his termination to the President's Cabinet. Feeling that an appeal to the Cabinet would be meaningless, Fields waived that appeal and sought direct review of the termination decision by the Board of Trustees. After a hearing on August 12,

1986, the Board unanimously affirmed his discharge.

Fields filed suit in the United States District Court for the District of Maryland under 42 U.S.C. § 1983. He alleged that the College failed to provide him adequate notice, documentation of the specific reasons for his discharge, and a fair pretermination hearing before an impartial decisionmaker as required by the policies and bylaws of the College and the conditions of his employment. In addition to a denial of his right to due process, Fields also alleged pendent state law claims for breach of contract, and wrongful discharge. The district court granted defendants' motion for summary judgment on the § 1983 claim and declined jurisdiction over the pendent state law claims. Plaintiff appeals.

II.

In Parratt v. Taylor, 451 U.S. 527 (1981), the Supreme Court held that when the state deprives an individual of a property interest as the result of the unauthorized failure of its agents to follow state procedure, due process is satisfied by the availability of meaningful post deprivation process. Id. at 543-44. The Court extended this holding to deprivations by intentional but unauthorized acts of state employees in Hudson v. Palmer, 468 U.S. 517, 533 (1984). The Court distinguished between deprivations caused by the random and unauthorized acts of state officials and those occasioned by conduct pursuant to established state procedure. Id. at 532-33. In the former due process is satisfied by the availability of

meaningful postdeprivation remedies; in the latter, under Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), it is not.

We conclude that this case is controlled by the holdings of Parratt and Hudson. Defendants' alleged failure to follow established state procedure in connection with Fields' termination was, even if intentional, a random and isolated occurrence not authorized by the state and, in fact, contrary to its procedures. If Fields was deprived of a fair and impartial hearing prior to his termination due process is satisfied by the availability of adequate state law remedies which he may pursue in state court. The fact that high-ranking officials were involved does not itself make Parratt/Hudson inapplicable. Holloway v. Walker, 790 F. 2d 1170,

1173-74 (5th Cir. 1986), cert. denied, 107 S. Ct. 571 (1986). Fields has thus failed to state a claim cognizable under § 1983.

A.

We note at the outset that the fact that a predeprivation hearing may be practicable does not invariably render Parratt/Hudson inapplicable. In fact, the emphasis in those cases on departures from established state procedures would appear to presuppose that the very subject addressed by the established procedures would often be predeprivation process. Similarly, in Yates v. Jamison, 482 F.2d 1182 (4th Cir. 1982), plaintiffs alleged that the City of Charlotte had destroyed a house they owned without notice and in violation of the due

process clause of the Fourteenth Amendment. Neither state nor city procedures authorized the demolition of a dwelling without a predeprivation hearing. The crux of the plaintiffs' complaint, we noted, was their allegation that their house was destroyed without notice only because the defendants violated established state procedure. Plaintiffs did not challenge the operation of the North Carolina statute or the Charlotte ordinances, both of which required notice and a hearing prior to the demolition of the dwelling.

In finding Parratt applicable, despite the fact that a predeprivation hearing was practicable, we held that Parratt "requires the dismissal of plaintiffs' complaint because they possess an adequate and meaningful postdeprivation remedy in the form of an

action for inverse condemnation in state court." Yates, 782 F.2d at 1185.

Here too the authorized state procedure calls for a pretermination hearing. In fact, such a hearing was held. After receiving warnings of deficiencies and a notice of termination, Fields waived his right to a hearing before the President's Cabinet and brought his appeal directly to the Board of Trustees. At the hearing before the Board, Fields was represented by counsel, produced witnesses on his behalf, presented numerous exhibits, and had the opportunity to testify and cross-examine. The Board unanimously affirmed Fields' termination for cause on August 15, 1986.

Fields does not argue that he was not provided with this process. Nor does he contend that the termination procedures set forth in the conditions of

his employment or the College's evaluation procedures or bylaws are constitutionally inadequate. Rather, he alleges that because he personally received inadequate notice, an untimely evaluation, insufficient information as to the reasons for his termination, and the like, the process with which he was provided failed to conform with that required by the College's rules and regulations and his employment agreement. Clearly, as the district court observed, the gravaman of all the claims asserted by plaintiff is that the defendants deprived him of due process by failing to conform to their own established procedures.

Such claims would appear to place plaintiff squarely within the holding of Parratt. Plaintiff contends, however, that defendants' actions resulting in his

termination without adequate process were not random and unauthorized but were, rather, the result of a policy decision by high ranking college officials amounting to established state procedure.

We do not agree. Allegedly inadequate predeprivation proceedings do not violate due process merely because they were conducted under color of state law; they must also have been authorized by the state. See Hudson, 468 U.S. at 532; Yates v. Jamison, 782 F.2d 1182, 1184-85 (4th Cir. 1986). The state neither explicitly nor implicitly authorized the allegedly deficient process at issue here. The process authorized by the state was that set forth in the College's rules and regulations and in the terms of Fields' employment agreement. Fields does not contend that these explicit procedures

were constitutionally deficient, and there is nothing to suggest that the state implicitly authorized deviations from them.

Fields has also not alleged that the College engaged in a pattern or practice of providing inadequate pretermination process. Rather, he claims that in this single instance, high ranking College officials, in contravention of established state procedure, provided him with a constitutionally deficient hearing to "squeeze" him out of the institution. While there is some suggestion that procedures for the termination of administrators are inadequate, the suggestion is wholly conclusory, made without reference to any other instance of administrator termination and indeed made without discussion of any alleged state policy or custom with respect to

administrative personnel. At issue, rather, is exactly the type of random and unauthorized conduct of state employees that the Supreme Court has recognized the state is powerless to predict or control and which can, therefore, consistent with due process, be redressed by meaningful postdeprivation remedies. Hudson, 468 U.S. at 517 and 532; see Holloway, 790 F.2d at 1173.

We agree with the Fifth Circuit that such isolated instances of misconduct become no less random or unauthorized simply because they were taken by high ranking officials. See Holloway, 790 F.2d at 1173-74. But see Patterson v. Coughlin, 761 F.2d at 886, 892 (2d Cir. 1985), cert. denied, 474 U.S. 1100 (1986). In Holloway, the Fifth Circuit made clear that even high-ranking state employees might engage in random and

unauthorized departures from established state procedures. Parratt/Hudson, it reasoned, was not on that account to be confined "to the actions of low level state employees who lack the power to grant a hearing." Holloway, 790 F.2d at 1173. So long as the state, "by procedure and in ordinary practice, does in fact provide the plaintiff with due process, no violation of the guarantee contained in the national Constitution occurs merely because the official who randomly deprives him of liberty or property without the hearing required by state law has the power to grant such a hearing." Id.

We think the Holloway approach applies to college trustees who must work within the strictures of the contracts and bylaws of their institution and the larger body of state law pursuant to

which these rules are promulgated. The trustees, no less than the state judge in Holloway, have the power to grant a hearing and to render a final decision on the discharge. They are also capable of unforeseeable departures from their legal obligations under state law for which, absent immunities which are not asserted here, they may be brought to account in state court. High-ranking officials are bound by the rule of law and their departures therefrom, no less than those of others, are subject to the Parratt holding. The theory of Parratt -- that the states possess the primary opportunity to redress unauthorized deprivations of property interests -- applies to this alleged deprivation in full force.

Admittedly, our analysis here presents but one approach to due process litigation. This circuit has adopted

several approaches which address the legal complexity and factual variety of individual cases.

In Davis v. Pak, No. 88-3039, slip op. (4th Cir. _____, 1988), for example, we held, consistent with Hagans v. Lavine, 415 U.S. 528, 536 (1974), that where a federal claim is insubstantial, federal jurisdiction is improper. Such an approach applies when federal jurisdiction is prefaced on an insubstantial federal claim or where the proffered claim is truly frivolous.

In Sui v. Johnson, 748 F.2d 238 (4th Cir. 1984), we did not rely upon Parratt because there was not plainly brought into issue an isolated deviation from authorized state procedures as alleged in the instant case. We asked simply whether the actions or procedures of the state sufficed to provide plaintiffs with

procedural due process.

Finally, in the instant case, as in Yates, when the state deprives an individual of a property interest as the result of the unauthorized failure of its agents to follow state procedure, we must look to see if a meaningful postdeprivation process is available. Under any of the above approaches, a grant of summary judgment for defendants or a motion to dismiss still affords plaintiff the critical option of bringing his pendent claims before state courts.

B.

Fields has available under state law adequate postdeprivation remedies to redress the defendants' alleged failure to provide him with pretermination process consistent with the College's

rules and regulations and the terms of his employment agreement. He may bring in state court his claims for breach of contract, wrongful discharge, civil conspiracy, and tortious interference with contract. The fact that the relief available under such state causes of action may not be coextensive with that available under such state causes of action may not be coextensive with that available under § 1983 does not render these state law remedies inadequate. Parratt, 451 U.S. at 543-44.

Not only are state law claims principally involved; so also is the proper application of a state institution's termination procedures. Where such claims are presented in the context of a single, random, and unauthorized failure of state officials to follow established procedure, an action under

§ 1983 will not lie. Parratt leaves to state law and to state courts the supervision of state officials and state institutions so long as authorized predeprivation remedies afford those affected by unauthorized departures the process to which the Fourteenth Amendment entitles them.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RALPH RODNEY FIELDS *

v. * Civil No. JFM-86-2941

JOSEPH T. DURHAM, et al. *

* * * * * * * * *

MEMORANDUM

In this action against the President and the Board of Trustees of the Community College of Baltimore, plaintiff challenges the termination of his employment as Dean of Faculty/Provost of the College. Plaintiff asserts a claim under 42 U.S.C. Section 1983 (1982), alleging that Defendants violated his due process rights by not giving him a full and fair hearing. He also asserts pendent state claims for breach of

contract, civil conspiracy, tortious interference with contractual relationships and wrongful discharge.

Defendants moved for summary judgment as to all of plaintiff's claims, and the parties submitted extensive memoranda on the issues raised by defendants. After reviewing the summary judgment papers, this Court wrote to counsel asking them to address the question of why the availability to plaintiff of post-deprivation remedies under state law does not constitute a bar to plaintiff's 1983 claim. The parties have now submitted memoranda on that issue.

The gravamen of all of the claims asserted by plaintiff in this action, both state and federal, is that before terminating his employment, defendants did not afford to him procedural rights

to which he was entitled under his contract and under the College's rules and regulation. According to plaintiff, these rights are at least as broad as the rights to which he was due under the due process clause. Accordingly, it is clear that the allegedly wrongful acts of which plaintiff complains were not "sanctioned by any established [state] procedure. To the contrary, plaintiff is contending that defendants acted arbitrarily by disregarding the established procedure which they were required to follow under state law. Under these circumstances it is clear that plaintiff has stated no claim under Section 1983. See Hudson v. Palmer, 468 U.S. 517 (1984); Parratt v. Taylor, 451 U.S. 527 (1981); Yates v. Jamison, 782 F.2d 1182 (4th Cir. 1986); cf. Logan v. Zimmerman Brush Co. 455 U.S.

422 (1982).[1] The very fact that plaintiff has asserted pendent state claims in this action attest to the availability to him of adequate post-deprivation remedies under state law.

For these reasons defendants' motion for summary judgment will be granted as to plaintiff's Section 1983 claim. The Court will decline to exercise pendent jurisdiction over plaintiff's state law claims. He is free to pursue those claims in state court.

Date: January 29, 1988

/S/
J. Frederick Motz
United States
District Judge

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[1]Plaintiff refers to Judge Ervin's "strong dissent" in Yates. However, Judge Ervin did not dispute the soundness of the principles upon which this case turns. Rather, he was of the view that defendants' conduct in Yates was undertaken pursuant to city policy and, thus, was not unauthorized as required by Parratt and Hudson.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RALPH RODNEY FIELDS *

v. * Civil No. JFM-86-2941

JOSEPH T. DURHAM, et al. *

* * * * * * * * * *

ORDER

For the reasons stated in the memorandum entered herein, it is this _____ day of January 1988

ORDERED

1. Defendants' motion for summary judgment is granted as to plaintiff's claim under 42 U.S.C. Section 1983 and judgment is entered in favor of defendants against plaintiff as to that claim; and

2. Plaintiff's pendent state law claims are dismissed without prejudice.

/S/
J. Frederick Motz
United States
District Judge

(2)

No. 88-986

FILED
MAR 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RALPH RODNEY FIELDS,

Petitioner,

v.

JOSEPH T. DURHAM, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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35pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Parratt v. Taylor, 451 U.S. 527 (1981), and its progeny will bar a claim under 42 U.S.C., Section 1983 resulting from an alleged deprivation of rights by the highest officials of a state institution when a predeprivation hearing is practicable.

TABLE OF CONTENTS

	Page
Counterstatement of Question Presented	i
Table of Authorities	ii
Counterstatement of the Case . .	1
Summary of Argument . . .	4
Argument: Reasons Why Writ Should Not Be Granted . . .	6
Conclusion	30

TABLE OF AUTHORITIES

Cases	Page
Arnett v. Kennedy, 416 U.S. 134, 94 S. Ct. 1633, 40 L.Ed. 2d. 15 (1974)	22
Boddie v. Connecticut, 401 U.S. 371, 91 S.Ct. 780, 28 L. Ed. 2d. 113 (1971)	20
Bretz v. Kelman, 773 F. 2d 1026 (9th Cir. 1985)	20, 26, 27
Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S. Ct. 1497, 84 L.Ed. 2d 494 (1985)	2
Daniels v. Williams, 748 F. 2d 229 (4th Cir. 1984), aff'd, 474 U.S. 327 (1986)	9
Fetner v. City of Roanoke, 813 F. 2d 183 (11th Cir. 1987)	19
Goolsby v. City of Montgomery, 805 F. 2d 1008 (11th Cir. 1986)	19
Holloway v. Walker, 790 F. 2d 1170 (5th Cir. 1986)	3, 26, 27
Hossman v. Spradlin, 812 F. 2d 1019 (7th Cir. 1987).	18
Hudson v. Palmer, 968 U.S. 517 (1984)	3, passim

Cases Page

Lake Nacimiento Ranch Co. v. San Luis Obispo County, 841 F. 2d 872 (9th Cir. 1987). 20

Lewis v. Hillsborough Transit Authority, 726 F. 2d 668 (11th Cir. 1984) 19

Littlefield v. City of Alton, 785 F. 2d 596 (8th Cir. 1988) 18

Logan v. Zimmerman Brush Co., 455 U.S. 422 71 L. Ed. 2d 265, 102 S. Ct.(1982) . 12, 26,27

Marino v. Ameruso, 837 F. 2d. 45 (2nd Cir. 1988) . . . 16

Parratt v. Taylor, 451 U.S. 527 68 L. Ed. 420, 101 S. Ct. 1908 (1981) 3, passim

Patterson v. Coughlin, 761 F. 2d 866 (2d Cir. 1985) 13

Piatt v. MacDougall, 773 F. 2d 1032)9th Cir. 1985) . . . 20

Pratt v. McDougall, 773 F. 2d 1032 (9th Cir. 1985) . . . 10

Salisbury v. Housing Authority of Newport, 615 F. Supp. 1433 (E.D. Ky. 1985) .21, 22, 23

Schaper v. City of Huntsville, 813 F. 2d 709 (5th Cir. 1987) . . . 22

Cases Page

Schultz v. Baumgart, 738 F. 2d 231 (7th Cur. 1984) . . . 17

Stachura v. Truszkowski, 763 F. 2d 211 (6th Cir. 1985) rev'd on other grounds, 474 U.S. 918 (1986) . . . 17

Stana v. School Dist. of City of Pittsburgh, 775 F. 2d 122 (3rd Cir. 1985) . . . 16

Vicory v. Walton, 721 F. 2d 1062 (6th Cir. 1983) . . . 25

Wilson v. The Civil Town of Clayton Indiana, 839 F. 2d 375 (7th Cir. 1988) . . . 17

Westborough Mall, Inc. v. City of Cape Girardeau, 794 F. 2d 330 (8th Cir. 1986), cert. den. 107 S. Ct. 1373 (1987) . . . 18

Yates v. Jamison, 782 F. 2d 1182 (4th Cir. 1986) 28, 29

STATUTE

42 U.S.C., Section 1983 . . passim

No. 88-986

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1988

RALPH RODNEY FIELDS,

Petitioner

v.

JOSEPH T. DURHAM, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

* * * * * *

COUNTERSTATEMENT OF THE CASE

On June 27, 1986, after having received an unsatisfactory evaluation, Ralph Rodney Fields was recommended for termination from his position as Dean of Faculty and Provost at the Community College of Baltimore

by the College's newly appointed president, Joseph T. Durham. The Board of Trustees approved Petitioner's termination after a hearing held on August 12, 1986 at which the Petitioner was represented and afforded all of the requirements of due process.[1] Petitioner subsequently filed an amended complaint against Durham, the College, and its Trustees under 42 U.S.C., Section 1983. He alleged that he had been denied due process by Respondent's failure to follow the procedures required by the bylaws of the College and the terms of his employment agreement in connection with his discharge. The District Court granted Defendants' Motion for Summary Judgment on the Section 1983 claim and declined jurisdiction over the pendent state law claims. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit.

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[1] In Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1497, 84 L.Ed. 2d 494 (1985), this Court found that the "root requirement" of

dants' Motion for Summary Judgment on the Section 1983 claim and declined jurisdiction over the pendent state law claims. Petitioner appealed to the United States Court of Appeals for the Fourth Circuit.

The Court of Appeals affirmed the District Court's decision holding that where the state deprives an individual of a property interest as the result of the unauthorized failure of its agents to follow state procedure, due process is satisfied by the availability of meaningful post deprivation process under Parratt v. Taylor, 451 U.S. 527 (1981), and Hudson v. Palmer, 468 U.S. 517 (1984). Further, it held that the fact that highranking officials were involved in the alleged deprivation does not, by itself, make Parratt/Hudson inapplicable, citing Holloway v. Walker, 790 F. 2d 1170, 1173-74 (5th Cir. 1986), cert. denied, 107 S. Ct. 571 (1986).

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the Due Process clause to be "that the individual be given the opportunity for a hearing before he is deprived of any significant property interest" Boddie v. Connecticut, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed. 2d 113 (1971).... 105 S.Ct. at 1493.

SUMMARY OF ARGUMENT

The decision of the Court of Appeals for the Fourth Circuit is entirely consistent with applicable decisions of this Court. This Court has held that if an individual has been deprived of a property interest under color of state law, and the deprivation did not occur as a result of some established state procedure, the existence of an adequate state remedy to redress property damages inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment. See Parratt v. Taylor, 451 U.S. 527 (1981). Further, the logic of Parratt v. Taylor, applies equally to unauthorized intentional deprivations of property by state officials. See Hudson v. Palmer 468 U.S. 517 (1984). The Court of Appeals held that Petitioner did not argue

that he was not provided with a pretermination hearing, or that the termination procedures set forth in the conditions of his employment were not followed, or that the College's evaluation procedures, or its by-laws were constitutionally inadequate. Rather, he alleged that because he personally received inadequate notice, an untimely evaluation, insufficient information as to the reason for his termination, and the like, the process with which he was provided failed to conform with what was required by the College's rules and regulations as well as his employment agreement. The Court of Appeals held that the gravamen of all the claims asserted by the Petitioner, was that the Respondents deprived him of due process by failing to conform to their own established procedures and such claims placed the Petitioner squarely within the holding of Parratt. Therefore, the Court of Appeals held that the allegedly inadequate predepri-

vation proceedings do not violate due process merely because they were conducted under color of state law; they must also have been authorized by the State. Consistent with Parratt and Hudson, supra, and other decisions of the Supreme Court, and other Courts of Appeals, the Fourth Circuit Court of Appeals properly upheld the action of the District Court.

ARGUMENT

I.

THE PETITON FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE FEDERAL COURTS OF APPEALS HAVE CONSISTENTLY HELD IN CONFORMITY WITH DECISIONS OF THE SUPREME COURT, THAT WHEN THE RANDOM OR UNAUTHORIZED ACTIONS OF HIGHRANKING OFFICIALS WHICH DEPARTS FROM ESTABLISHED STATE PROCEDURES DEPRIVE AN INDIVIDUAL OF A PROPERTY INTEREST, DUE PROCESS IS SATISFIED BY THE AVAILABILITY OF MEANINGFUL POST DEPRIVATION PROCESS.

The only question which should properly be before this Court is whether or not the District Court erred when it deter-

mined that the Petitioner had not stated a claim under Section 1983. The District Court's determination was made based upon the Petitioner's own allegations that the Respondent acted arbitrarily by disregarding the established procedure which they were required to follow under State law concerning termination of Petitioner's employment.

Petitioner now asks this Court to consider another question, that is, whether or not Parratt and its progeny bars a claim under 42 U.S.C., Section 1983 resulting from a deprivation of rights by the highest officials of a state institution when a pre-deprivation hearing is practicable. Although this is a different questions from that presented by Petitioner at the Court below, the results must be the same, based upon the decisions in Parratt v. Taylor, and Hudson v. Palmer, supra.

Parratt v. Taylor, supra, stands for the proposition that:

> When deprivations of property are affected through random and unauthorized conduct of a state employee, predeprivation procedures are simply impracticable since the state cannot know when such deprivations will occur. Id. at 543.

No distinction was made between negligent or intentional deprivation, since the State cannot anticipate and control such acts in advance. Utilizing this reasoning, this Court further held that:

> An unauthorized intentional deprivation of property by a State employee does not constitute a violation of the procedural requirements of the Due Process Clause ...if a meaningful post-deprivation remedy for the loss is available. Ibid. See also Hudson v. Palmer, 468 U.S. 517 (1984).

The Court in Parratt[2] emphasized two important points. First, there must be a tortious loss of property as a result of a random and unauthorized act by a state employee. Secondly, the loss must be the result of some established state procedure.

If all of the Petitioner's allegations are taken as true, that is, that the Respondents failed to provide adequate notice and specification of the charges against him; failed to provide a hearing before an impartial decision maker; and failed to adhere to its own policies and procedures, the Petitioner still has not made out a claim under Section 1983. The fact remains that the Petitioner's complaint arose from the alleged inadequacies of the due process hearing which

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[2]Of course, Parratt was overruled to the extent that negligent deprivations of property without due process are no longer recognized as violations of the due process clause actionable under Section 1983 even if no post-deprivation remedies are available. See Daniels v. Williams, 106 S. Ct. 662 (1986).

the Respondents provided. Even if the Petitioner's assertions are taken as true, that the pretermination hearing was deficient, the State was not in a position to provide a predeprivation hearing at that juncture. In other words, the State did not and could not have learned of the deprivation until after it occurred. See Pratt v. McDougall, 773 F. 2d 1032 (9th Cir. 1985), at 1036. Nor could the State have authorized the Respondents' actions. The State could, however, provide post-deprivation remedies concerning the inadequacies of the pre-termination hearing by way of a tort or contract action.

Further, the Petitioner has yet to allege that the Respondents' actions were authorized by state law, still another requirement under Parratt. The Petitioner could not, and did not allege that the state system itself destroyed his property interests. He alleged only that the Respondents acted in contraventionof not only state

policy and procedure, but also in contravention of the College's own policy and procedure concerning due process requirements, prior to termination of his employment at the College.

In Hudson v. Palmer, 104 S. Ct. 3194 (1984), this Court expanded upon Parratt and found that...:

> The underlying rationale of Parratt is that when deprivations of property are effected through random and unauthorized conduct of a state employee, pre-deprivation procedures are simply "impracticable" since the state cannot know when such deprivations will occur. We can discern no logical distinction between negligent and intentional deprivations of property insofar as the "practicability" of affording pre-deprivation process is concerned. The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signaling his intent.... Accordingly, we hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of

> the Due Process Clause...if a meaningful post-deprivation remedy for the loss is available." Id. at 3203.

The result of the decision in Parratt and Hudson is that where an employee of the State allegedly participates in random and unauthorized acts that result in the deprivation of an individual's property interest, the only obligation of the State is to provide a meaningful post-deprivation remedy. A post deprivation judicial hearing can satisfy that obligation.

In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), this Court distinguished Parratt, noting Parratt was limited to situations where a random and unauthorized act of a state employee deprived an individual of a property interest. In contrast, the Logan decision dealt with a situation where the established state procedure itself caused an individual a deprivation of his/her property rights. Since Petitioner has not alleged that any of the State procedures, or

the College's procedures caused a deprivation, but has instead, alleged that a state employee deprived him of certain due process rights, which at best, according to Petitioner's facts, were random and unauthorized, Petitioner claims certainly fall squarely within the parameters of Parratt.

The Petitioner argues that the decision of Court below conflicts with the decisions of other Circuits. Those cases which appear to conflict with the Fourth Circuit contain facts which were not present in the Petitioner's case, or involve another type of interest, such as a liberty interest, which has been treated differently by this court than a property interest.[3]

The Petitioner cites Patterson v. Coughlin, 761 F. 2d 866 (2d Cir. 1985), in support of an argument that Parratt is not applicable. In Patterson, a prison inmate

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[3]See Parratt v. Taylor, 451 U.S. 527, 545 (1981) (Blackmun, J., and White, J., concurring).

was placed in isolation by state officials in violation of state law, and without being afforded a prior due process hearing. The Court held that based upon the Complaint, the deprivation of the inmate's liberty was neither random nor unauthorized so as to excuse, on the ground of impossibility, the State's failure to provide an adequate hearing before the decision to discipline the inmate was made. Id. at 887. Further, the Court specifically found that there was confusion between the concept of a deprivation of a liberty interest and the concept of a denial of the constitutional right to procedural safeguards. It reasoned that "the denial of a constitutionally sound pre-deprivation hearing is a separate and distinct injury from the loss of liberty." Id. at 892. The Court further found that:

> Although the denial of due process may have been unauthorized, the deprivation of liberty at issue here does not appear to have been unauthorized, as that term is meant by Parratt.... Unlike the deprivation of property that occurred in Parratt, here the

> responsible state officials who had the power to grant Appellant a hearing obviously knew that Appellant was in peril of being deprived of his liberty interest. In fact, he was given a hearing, albeit a deficient one. (emphasis added). Thus, the deprivation of liberty (emphasis added) was neither random nor unauthorized. Patterson at 892.

The Second Circuit recognized two issues: the deprivation of inmate's right to procedural due process, and the deprivation of his liberty interest. The procedural due process issue was resolved and cured under Parratt, but the deprivation of liberty issue was not addressed at all by the defendant officials or the District Court. Patterson's liberty interest was not addressed or resolved under Parratt because no attempt was made by the defendants in that case to provide a hearing prior to depriving him of his liberty interest. Parratt was further distinguished,

in that it only involved a property interest, as does the Petitioner's case. Patterson is therefore inapplicable.[4]

In Stana v. School Dist. of City of Pittsburgh, 775 F. 2d 122 (1985), the Court had before it two questions: Whether or not Stana was entitled to due process prior to having her name removed from an eligibility list for a teaching position; and assuming that she did, whether or not the defendants could have provided notice and an opportunity to be heard. Neither of these questions are presented to this Court in the present case.

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[4]Recently, the Second Circuit found in Marino v. Ameruso, 837 F. 2d. 45 (2nd Cir. 1988),that a city employee claiming denial of procedural due process...had a duty to prove inadequacy of state procedural remedies as an element of his procedural due process violation claim. Id. at 47. Additionally, the Second Circuit supports the prevailing thought amongst the other courts of appeal that if an individual has a "property right lost because of a random and unauthorized act by a State actor...the existence of an adequate post deprivation state remedy for the loss affords due process ..." Id. at 47, citing Hudson and Parratt.

The Respondents are not contending that Petitioner was not entitled to due process prior to his termination. Petitioner acknowledges that he was provided a hearing before the Board of Trustees on August 12, 1986, albeit allegedly deficient.

Stana, however, was not afforded a hearing, nor did the defendants in that case acknowledge that she was entitled to one. In this case, Petitioner was provided a predeprivation hearing, but was dissatisfied with it. The forum which must properly address that dissatisfaction must be the State judicial forum. That is, adequate post-deprivation remedies are available to Fields which comport with the requirements of Parratt and its progeny. Stachura v. Truszkowski, 763 F. 2d 211 (6th Cir. 1985), Rev'd on other grounds, 474 U.S. 918 (1986) and Schultz v. Baumgart, 738 F. 2d 231 (7th Cir. 1984),[5] both stand for the same proposition

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[5] In Wilson v. The Civil Town of Clayton Indiana, 839 F.2d 375 (7th Cir. 1988), Plaintiff business owner filed a Section 1983 to recover

and present the same issues as Stana, and are therefore distinguishable from Petitioner's case.

Petitioner further cites a line of cases which stand for the proposition that where a pre-termination due process hearing was practical and feasible, post-deprivation remedies are inadequate. See Littlefield v. City of Alton, 785 F. 2d 596 (8th Cir. 1986); Westborough Mall, Inc.v. City of Cape Girar-

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damages based on eviction of employees and customers from his place of business. The Court found that:

> "Under Parratt, when deprivations of property are effected through random and unauthorized action of state employees and the state provides an adequate post-deprivation remedy, the requirements of due process are satisfied, and Plaintiff may not maintain a Section 1983 suit in Federal Court."

Parratt, 451 U.S. at 543. That Court found that since Plaintiff had available, through the Indiana Tort Claims Act (citation omitted), post deprivation process for his claim, the "state remedy was 'adequate' to satisfy the standard of Parratt. See also Hossman v. Spradlin, 812 F. 2d 1019 (7th Cir. 1987)."

deau, 794 F. 2d 330 (8th Cir. 1986), cert. den. 107 S. Ct. 1373 (1987); Fetner v. City of Roanoke, 813 F. 2d 183 (11th Cir. 1987).[6]

As previously stated, this argument falls short of the fact that the Petitioner was provided a hearing prior to termination, and was dissatisfied with that process. If the process was deficient, the acts were at best, random and unauthorized, not sanctioned by State law or procedure, but could, however, be cured by adequate post-deprivation remedies.

The Petitioner also cites cases which involved deliberate considered acts of State officials, (and in one case, a conspiracy), designed to deprive plaintiff of his

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[6] But see Goolsby v. City of Montgomery, 805 F. 2d 1008 (11th Cir. 1986), wherein the 11th Circuit found in applying Parratt in an employment termination situation that:

> "The legacy of Parratt and its progeny is that such unauthorized conduct...can be cured by various post deprivation remedies which can be provided by the State. This conclusion has been embraced in the Circuit by Lewis v. Hillsborough Transit Authority, 726 F. 2d 668, 669 (11th Cir. 1984)." Id. at 1011.

rights, under the apparent authority of state law. See Piatt v. MacDougall, 773 F. 2d 1032 (9th Cir. 1985), and Bretz v. Kelman, 773 F. 2d 1026 (9th Cir. 1985).[7] In both cases the Courts found that such acts could not be considered random, nor could the State provide a meaningful post-deprivation remedy since it was the State process itself which was abused.

Both cases can be distinguished from Petitioner's, in that no matter how one reads Petitioner's Complaint, there is no allegation that the Respondents used state procedure or law, to deprive him of his due process rights. As pointed out by the lower Court, Petitioner alleged the opposite, that

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[7] But see Lake Nacimiento Ranch Co. v. San Luis Obispo County, 841 F. 2d 872 (9th Circuit 1987) wherein the 9th Circuit found that the availability of adequate state remedies defeated a procedural due process claim, relying on Parratt.

the Respondents disregarded the established state procedures they were required to follow under state law.

Finally, the Petitioner cites Salisbury v. Housing Authority of Newport, 615 F. Supp. 1433 (E.D. Ky 1985), as being supportive and similar to his case. In Salisbury, the plaintiff essentially alleged that while her pre-termination hearing contained "all of the outward indicia of due process," Id. at 1438, she was denied due process because the Housing Authority which ultimately terminated her was biased. The Court in that case spent a considerable amount of time discussing whether or not the Housing Authority was, in fact, biased, and found that it was, primarily because the Housing Authority itself would have been implicated in improprieties had the plaintiff been vindicated. Although Petitioner herein alleged in his amended Complaint that the Board of Trustees was not an impartial

tribunal, he has not made any allegations which could support a finding of "disqualifying personal bias," as defined by the Court in Salisbury, which would have denied him an impartial tribunal.[8]

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8 See Schaper v. City of Huntsville, 813 F. 2d 709 (5th Cir. 1987) where that Court found that due process does not require the State to provide an impartial decisionmaker at a pretermination hearing, relying on Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed. 2d 15 (1974), wherein this Court debated whether or not an impartial decisionmaker at the pretermination stage was required. Justice White concurred in part and dissented in part explaining that...:

> Fairness and accuracy are not always treated simply because the leading examiner is the supervisor of an employee.... But there the hearing official was the object of slander that was the basis for the employee's proposed discharge. In ruling that the employee was to be terminated, the hearing examiner's own reputation ...was at stake. 416 U.S. at 199, 94 S. Ct. at 1666.

In a plurality decision, Chief Justice Burger, and Justices Rehnquist and Stewart, and Justices Powell and Blackmun concurring found that due process does not require an impartial hearing officer at the pretermination stage.

Further, in a brief footnote, the Court distinguished Parratt from Salisbury by simply stating that because the Housing Authority had the opportunity to anticipate and control the proceedings, it was not a case of random, unauthorized conduct where a pre-deprivation hearing was impracticable or impossible under Parratt. The Court, however, reached its conclusion in the limited context of the defendants' unwillingness to provide an impartial tribunal since they themselves had so much at stake. Salisbury, both prior to and during the hearing, consistently demanded an impartial tribunal, (Salisbury at 1436). Her protests were ignored. Similar demands to those made in Salisbury were not made by Petitioner, and Petitioner's Complaint does not center upon the issue of impartiality. Salisbury can at best only be instructive in the law dealing with proving impartiality, and is therefore distinguished from Petitioner's case.

In summary, the decisions of the Second, Third, and Eighth Circuits take the position that when there is a violation of State law by highranking officials, it is not random and unauthorized if carried out pursuant to a practice or policy established by that body. Thus, even if Petitioner's argument that Respondents actions could not be random and unauthorized by virtue of their rank was successful, Petitioner has not alleged that Respondents acted in accordance with some policy or practice established at their institution.

This Court held that state post-deprivation judicial process could satisfy a due process requirement when the taking is caused by a "random and unauthorized act," as opposed to the enforcement of an "established state procedure". The next query is what process is due, and whether or not there are available state judicial remedies which may satisfy the process due. Finally, once the

Court finds that the State remedies can satisfy the due process requirements, the Respondents must prevail on the merits, because the Petitioner has failed to make out a claim under Section 1983.

II. ABSENT A CLAIM UNDER 42 U.S.C., SECTION 1983, THE PROPER FORUM FOR THE PETITIONER'S CASE IS THE STATE COURT.

Case law emanating from other jurisdictions are in accord with the Court below in the application of the Parratt and Hudson doctrine.

In Vicory v. Walton, 721 F. 2d 1062 (6th Cir. 1983), it was held that:

> The reasoning of Parratt appears to extend at least to all Section 1983 cases claiming a procedural due process injury to a property interest without regard to whether, at common law, a plaintiff would have sued in tort or contract.... Policy considerations do not require a federal hearing in procedural due process cases that can be corrected in state court.

This reasoning is in keeping with the lower Court's determination that Petitioner's remedies should properly be sought

in state court, particularly because the majority of his claims are pendent, and the gravamen of his constitutional claim involves procedural due process violations, therefore bringing Petitioner directly in line with Parratt.

In Holloway v. Walker, 790 F. 2d 1170 (5th Cir. 1986), cert. denied 107 S. Ct. 571 (1986), the Court specifically attacked the reasoning ennunciated in several of the cases cited by Petitioner in the present case. It found that it could not agree with the reasoning in Bretz v. Kelmon, 773 F. 2d 1026 (9th Cir. 1985), wherein the plaintiff alleged that the police, prosecutors, and others conspired to prosecute him. The Bretz Court found Parratt and Hudson were inapplicable because they applied only to minor deprivations of liberty or property; that a conspiracy cannot be "random," and that Logan

instead of Parratt was controlling. The Holloway Court disagreed, and specifically found that:

> Nothing in Parratt or Hudson suggests that the holdings of these cases are confined to minor deprivations of liberty or property. If the Supreme Court intended these cases to announce a constitutional rule of lex non curat de minimis, it would have said so. (citation ommitted).... The Ninth Circuit's conclusion that a conspiracy cannot be a random act is also unpersuasive. From the point of view of the state, a conspiracy among its employees can indeed be a random act if the state cannot anticipate and control such conduct in advance (citation omitted) ...the effect of the Ninth Circuit holding is to revive the intentional/negligent act distinction, rejected in Hudson, in another form.... Finally, we decline to follow the view of the Ninth Circuit that Logan extends to an illegal conspiracy case.... Logan was deprived of due process not because the Commission illegally delayed in acting on his claim but because the estalished state procedure failed to provide Logan with a remedy.... By contrast in Bretz, the plaintiffs had adequate appellate remedies to correct the deprivations caused by the illegal acts of the conspiring parties.... Holloway at 1172.

Petitioner's arguments concerning the misapplication of state procedure, the involvement of the highest ranking officials at the College in the misapplication, and the alleged intentional abuse of the process by these officials, do not exempt him from the Parratt/Hudson doctrine, and are not supported by the authorities cited.

In 1986, the City of Charlotte allegedly demolished Plaintiff's house without prior notice, as required by the due process clause of the Fourteenth Amendment, Yates v. Jamison, 782 F. 2d 1182 (4th Cir. 1986). In that case, the Fourth Circuit noted that the Plaintiff was in fact entitled to a hearing and that a hearing was practicable. However, since Plaintiffs did not challenge the operation of the State or local law concerning condemnations, Plaintiff's complaint was dismissed because "they possess[ed] an adequate and meaningful post

deprivation remedy in the form of an action for inverse condemnation in State Court." Yates, 782 F. 2d at 1185.

Similarly, Petitioner has at his disposal several avenues which he may pursue in state Court if he feels aggrieved by the actions taken by Respondents in the case at Bar regarding his termination.

It is clear that the Fourth Circuit has been consistent in its decisions regarding the application of Parratt and Hudson that if Petitioner is not contesting the state or local laws, or institutional policies themselves, but instead,has contested a state official's action which allegedly fall outside of the confines of those laws, policies, or procedures, then clearly Petitioner has not made out a claim under 42 U.S.C., Section 1983.

CONCLUSION

For the reasons stated above, Respondents respectfully submit that the decision of the Fourth Circuit does not conflict with the decisions of other federal courts of appeals on the same matter and respectfully urge this Court to deny the present petition.

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